

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WAYMO LLC,

Plaintiff,

vs.

UBER TECHNOLOGIES INC., et al.,

Defendants.

Case No. 3:17-cv-00939-WHA

**DECLARATION OF JOHN GARDNER  
IN SUPPORT OF REQUEST FOR  
ORDER HOLDING THAT NON-PARTY  
ANTHONY LEVANDOWSKI DID NOT  
WAIVE ATTORNEY CLIENT  
PRIVILEGE**

I, John Gardner, declare as follows:

1. I am a member of the bar of the State of California and a partner with Donahue Fitzgerald LLP. I submit this declaration in support of nonparty Anthony Levandowski's request for an order holding that he did not waive his attorney-client privilege over communications that resided within digital devices and other electronic data he provided to Stroz Friedberg as part of its due diligence review. I have personal knowledge of the facts stated herein, and, if called and sworn as a witness, I could and would testify competently as follows.

2. On or about January 28, 2016, Anthony Levandowski retained Donahue Fitzgerald LLP ("Donahue") to represent him in connection with a proposed transaction between Ottomotto LLC ("Otto") and Uber Technologies, Inc. ("Uber") (the "Transaction"). I was the principal Donahue partner handling the matter.

3. In connection with the Transaction, O'Melveny & Myers ("O'Melveny") and Morrison and Foerster ("Morrison"), on behalf of their respective clients Otto and Uber, engaged Stroz Friedberg LLC ("Stroz") to conduct a forensic examination of electronic and hard copy data of certain individuals, including Mr. Levandowski. A true and

1 correct copy of the Engagement Letter, dated March 4, 2016, is attached hereto as Exhibit A.

2 4. As set forth in my previous Declaration (*see* Dkt. 382, and attached  
3 hereto as Exhibit B), I believed that the parties recognized from the outset of the potential  
4 transaction that there was a tangible risk of litigation by Google against Uber, Otto, Mr.  
5 Levandowski and/or Mr. Ron if the transaction was consummated. On the basis of this risk, I  
6 reached an understanding with counsel for Uber, Otto, and Mr. Ron that the parties were  
7 proceeding under a common interest agreement to allow the parties and their counsel to share  
8 information freely in order to evaluate litigation risk, anticipate defenses, and assess legal  
9 strategies without risking any waiver of privilege. On March 11, 2016, I received a draft  
10 Joint Defense, Common Interest, and Confidentiality Agreement for the purpose of  
11 confirming our prior discussions and agreement that the parties were working jointly in  
12 furtherance of a common interest. See also Dkt. 381 at ¶¶ 4, 8, and Exhibit B.

13 5. Notwithstanding the common interest protections I understood to be  
14 operative, and as a further precaution, on or about March 7, 2016, I prepared a letter to Stroz  
15 in connection with the proposed delivery of materials and devices by Mr. Levandowski to  
16 Stroz. Attached hereto as Exhibit C is a true and correct copy of the letter to Stroz, dated  
17 March 7, 2016 (“Attorney-Client Protective Letter”). Attached hereto as Exhibit D is a true  
18 and correct copy of an e-mail from Adam Bentley, dated March 7, 2016 confirming that the  
19 Attorney-Client Protective Letter had been delivered to Stroz. My understanding was that  
20 Stroz required direct access to the physical electronic devices in order to review metadata  
21 such as file deletion histories, last-access logs, and other forms of system activity in an  
22 unaltered form. Given the nature of electronic examination, and the necessity that electronic  
23 devices be delivered in order to perform that examination, Donahue sent the Attorney-Client  
24 letter to Stroz in order to prevent the delivery of Mr. Levandowski’s electronic devices, hard  
25 copy files and other electronic data to Stroz from being deemed a waiver of the attorney-  
26 client privilege as to specific attorney-client privileged communications contained in those  
27 materials. The Attorney-Client Protective Letter set forth conditions under which Mr.

1 Levandowski would agree to deliver materials to Stroz. These conditions included specific  
 2 prohibitions preventing Stroz from reviewing or accessing any attorney-client  
 3 communications or attorney work product contained in any materials that would be delivered  
 4 to Stroz, and set forth a process for the segregation and return of such communications to Mr.  
 5 Levandowski. Specifically, the Attorney-Client Protective Letter states in part,

6           The Accessed Materials are likely to contain Privileged  
 7 Documents as to which Mr. Levandowski holds the attorney-  
 8 client privilege from disclosure to third parties, including the  
 9 Clients [meaning Stroz's clients, Uber and Otto]. In the event  
 10 Stroz discovers Privileged Documents during the course of the  
 11 Stroz Examination, *we are instructing Stroz not to review the*  
 12 *content of any such Privileged Documents inadvertently*  
 13 *included in the Accessed Materials. Stroz is further directed to*  
 14 *immediately segregate and return to us any Privileged*  
 15 *Documents discovered during the course of the Stroz*  
 16 *Examination. As described in the Stroz engagement letter, Stroz*  
 17 *is not authorized to directly or indirectly disclose any Privileged*  
 18 *Documents, nor the content or existence of such materials, to its*  
 19 *Clients or to any third party whatsoever.*

20 Exh. B, p. 1 (emphasis added)

21           6. In or about March, 2016, Stroz requested that Mr. Levandowski provide  
 22 Stroz access to physical electronic devices, hard copy files, and other electronic data in order  
 23 to conduct its forensic review. In order to prevent the delivery of Mr. Levandowski's  
 24 electronic devices, hard copy files and other electronic data to Stroz from being deemed a  
 25 waiver of the attorney-client privilege as to specific attorney-client privileged  
 26 communications contained in those materials, Donahue required Stroz to enter into a letter  
 27 agreement restricting Stroz's access to and dissemination of materials delivered to Stroz.  
 28 Attached hereto as Exhibit E is a true and correct copy of the letter (the "Devices Protective  
 Letter"), dated March 21, 2016, which includes a "Protocol for Review of Data and Devices"  
 ("Stroz Examination Protocol"). Stroz signed the letter on March 22, 2016. Attached hereto  
 as Exhibit F is a true and correct copy of the e-mail transmittal from Stroz, dated March 22,  
 2016, attaching the Stroz counterpart copy of the Devices Protective Letter.

7. In the Devices Protective Letter, Stroz agreed to limit its review of the

1 electronic data according to the terms set forth in the Stroz Examination Protocol (*see Exhibit*  
2 *E*). The protocol provided a process by which Stroz would cull out and segregate attorney-  
3 client communications into a separate folder and then review the electronic data, including  
4 the physical electronic devices, to identify documents relevant to the investigation. The  
5 protocol also enabled Donahue, as attorneys for Mr. Levandowski, to monitor, restrict and  
6 pre-approve any access by Stroz to privileged information or delivery of material to  
7 O'Melveny or to Morrison, or their respective clients.

8           8. Under the Stroz Examination Protocol, the term "O'Melveny" is  
9 defined to refer jointly to O'Melveny and separate counsel retained by the individual  
10 employees subject to due diligence. The protocol provides in part, "For purposes of this  
11 Protocol, the term 'O'Melveny' means O'Melveny & Meyers and if applicable, any separate  
12 counsel retained by the Diligenced Employee." *Id.* at p. 4; *see also* p. 3 ("O'Melveny &  
13 Myers and . . . any separate counsel retained by the Diligenced Employee (jointly for all  
14 purposes under this protocol, "O'Melveny)"). Donahue, as counsel to Mr. Levandowski, was  
15 thus included within the definition of "O'Melveny" for purposes of the Stroz Examination  
16 Protocol, as were the attorneys for the other Diligenced Employees.

17           9. In order to ensure that Stroz would adhere to the Stroz Examination  
18 Protocol, I sent a letter to Stroz on March 23, 2016, reiterating that Mr. Levandowski took  
19 Stroz's covenants under the Devices Protective Letter seriously, and expected to enforce  
20 those obligations separate and apart from Stroz's representation of its clients under the  
21 Engagement Letter. Attached hereto as *Exhibit G* is a true and correct copy of the letter to  
22 Stroz dated March 23, 2016, reiterating Stroz's obligations to Mr. Levandowski. The letter  
23 reiterates that, "The permitted disclosures under the Protocol are subject to the prior approval  
24 of Donahue Fitzgerald LLP." Donahue consistently exercised its right to approve Stroz's  
25 access and disclosures during the Stroz Examination.

26           10. The Stroz Examination Protocol describes the process by which Stroz  
27 would isolate potentially privileged documents contained in the devices and other  
28

1 electronic data delivered to Stroz:

2 “O’Melveny has included a list of attorney client names, firms,  
3 domains, addresses, and telephone numbers for Stroz Friedberg  
4 to use in identifying potentially privileged documents and  
5 communications. Stroz Friedberg will use this list, its own  
6 manual review, and its proprietary privilege-identifying  
7 algorithms to identify privileged documents and e-mails that  
8 relate to the subject matter of the investigation. Stroz Friedberg  
9 will create a folder on Stroz Review that contains such  
10 documents and e-mails – whether active, deleted, or fragments –  
11 and O’Melveny will create and deliver to Morrison a privilege  
12 list relating to those documents.”

13 *Id.* at p. 3, n. 1.

14 11. The Stroz Examination Protocol also provides that only non-privileged  
15 documents would be included in the Proposed Disclosure Folder, consisting of documents  
16 that would potentially be disclosed in connection with its examination, providing in part:

17 At the end of its investigation, if Stroz Friedberg believes that  
18 **non-privileged**, [footnote 1] relevant documents or  
19 communications – whether active, deleted, or fragments --  
20 should be shared with O’Melveny and Morrison, it will first  
21 place those documents in a folder (the ‘Proposed Disclosure  
22 Folder’) on Stroz Review for review by O’Melveny, but shall not  
23 provide Morrison access to the Proposed Disclosure Folder.

24 *Id.* at 3-4 (emphasis added).

25 12. The Stroz Examination Protocol further provided a “fail-safe” provision  
26 in the event privileged communications came to be located in the Proposed Disclosure Folder,  
27 providing in part,

28 If O’Melveny claims that any of the documents subject to  
proposed disclosure are subject to the attorney-client privilege,  
attorney work product privilege, or other restriction on  
disclosure O’Melveny will produce a privilege log to Morrison  
regarding such documents, and Stroz Friedberg will, unless and  
until the documents are cleared for disclosure by O’Melveny,  
remove the documents from the Proposed Disclosure Folder.

*Id.* at 4.

13. My understanding based on the Attorney-Client Protective Letter, the  
Devices Protective Letter, and the Stroz Examination Protocol described above was that Stroz  
would not review the content of attorney-client communications contained in Mr.

1 Levandowski's electronic devices, but that any such materials would be subject to a privilege  
2 log prepared by Donahue.

3 14. Following this protocol, Stroz Friedberg contacted attorneys including  
4 Donahue (again, included in the defined term "O'Melveny") and requested a list of counsel in  
5 order to segregate potentially privileged documents as it prepared to conduct its review.  
6 Attached hereto as Exhibit H is a true and correct copy of an email from Stroz dated April 1,  
7 2016, requesting a list of counsel in order for Stroz to segregate potentially privileged  
8 documents from its review. In response to that request, I provided a list of Mr.  
9 Levandowski's attorneys and law firms to Stroz for purposes of screening attorney-client  
10 privilege and attorney work product materials. Attached hereto as Exhibit I is a true and  
11 correct copy of an email dated April 1, 2016, listing attorney-client search terms. My  
12 understanding of the privilege screening process was that Stroz would run the search terms to  
13 segregate privileged documents. I am informed and believe, based on the Attorney-Client  
14 Protective Letter, the Stroz Examination Protocol, and my communications with Stroz, that  
15 Stroz followed the process described in the Stroz Examination Protocol and used the attorney  
16 and law firm search terms provided by Donahue and O'Melveny to electronically isolate  
17 communications to or from those persons or entities and segregate those potentially  
18 privileged communications in a privilege folder. In addition, I am informed and believe that  
19 Stroz did not review any of the communications in the Privilege Folder for content and did  
20 not provide them to O'Melveny, counsel to Ottomotto, Morrison, counsel to Uber, or any  
21 third parties.

22 15. Prior to April 11, 2016, the date after which the court has determined  
23 that a common interest privilege arose, Stroz did not contact Donahue at any time to request  
24 permission to review potentially privileged communications in the privilege folder or  
25 regarding potentially privileged communications which might have come to be located in the  
26 Proposed Disclosure Folder.

27 16. I am informed and believe that Mr. Levandowski delivered  
28



1 devices to Stroz at various times in March 2016. After the delivery of the devices to Stroz,  
2 Donahue (as part of the defined term "O'Melveny") directed Stroz on behalf of Mr.  
3 Levandowski regarding the implementation of the protocol within the limitations of the Stroz  
4 Examination Protocol. Stroz consistently sought permission from Donahue prior to running  
5 search terms and providing information to the parties. Donahue diligently required Stroz to  
6 adhered to the Protocol, required to Stroz to seek permission before disclosing information  
7 and did not disclose any information to O'Melveny & Myers, Morrison or their respective  
8 clients except in strict adherence with the Stroz Examination Protocol. Stroz consistently and  
9 repeatedly requested permission for disclosures to O'Melveny & Myers and to Morrison.  
10 Attached hereto as Exhibit J are true and correct copies of correspondence with Stroz in  
11 which Stroz complied with the restrictive Stroz Examination Protocol as agreed to in the  
12 Device Protective Letter. I am informed and believe, on the basis of my letters, e-mails and  
13 other communications with Stroz, that Stroz complied with the requirements of the  
14 Examination Protocol.

15 17. Throughout the Stroz examination process leading up to April 11, 2016,  
16 I consistently expressed to Stroz as well as counsel for Uber that it was Donahue's intent to  
17 prevent the disclosure of Mr. Levandowski's privileged attorney-client communications, and  
18 Donahue imposed conditions on Mr. Levandowski's delivery of his electronic data and his  
19 physical electronic devices to Stroz in order to prevent such disclosure.

20 I declare under penalty of perjury under the laws of the State of California that  
21 the foregoing is true and correct to the best of my knowledge. Executed this 25<sup>th</sup> day of  
22 September, 2017, at Walnut Creek, California.

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24   
25 JOHN F. GARDNER  
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